IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JAMES E. WEBER, Trustee of the James E. Weber Revocable Trust u/d 2/18/04,

Appellant,

v.

IOWA STATE BANK AND TRUST COMPANY OF FAIRFIELD, IOWA, an Iowa corporation, IOWA STATE FINANCIAL SERVICES CORPORATION, an Iowa corporation, BILL ADAM, NELSON ANDERSON, JOE CARR, SARAH COCHRAN, DAVID C. EASTBURN, MIKE GREINER, PAT MCMAHON, JAY SILVERMAN, JON SIMPLOT, TOM THOMPSON and STEVE TRIPLETT,

Appellees.

Case No. 05-4274

Brief and Addendum of Appellant James E. Weber, Trustee of the James E. Weber Revocable Trust u/d 2/18/04

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PREFACE

Plaintiff/Appellant, JAMES E. WEBER, Trustee of the James E. Weber Revocable Trust u/d 2/18/04, shall be referred to herein as the "Plaintiff." Defendant/Appellee, IOWA STATE BANK AND TRUST COMPANY OF FAIRFIELD, IOWA, an Iowa corporation, shall be referred to herein as the "Bank." Defendant/Appellee, IOWA STATE FINANCIAL SERVICES CORPORATION, an Iowa corporation, shall be referred to herein as the "Majority Shareholder. The individual Defendants/Appellees shall be referred to herein collectively as the "Bank Directors" or individually as "Defendant and last name." Defendants/Appellees collectively shall be referred to as "Defendants."

Plaintiff's Appendix (2 volumes) shall be referred to as A. App. I. and A. App. II.

Plaintiff's Addendum shall be referred to as A. Ad.

SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

The District Court granted Defendants' Motion for Summary Judgment which upheld the action of the Bank and its Directors to eliminate the Bank's minority shareholders, including the Plaintiff, by implementing a reverse stock split causing the minority shareholders to have fractional shares, cash them out, and leave Plaintiff with only an appraisal remedy that required consideration of minority and marketability discounts.

The Bank was paying a higher rate on dividends than it was receiving on invested excess liquidity. It had available funds on hand to cash out the minority shareholders for no more than book value. The Directors had a conflict of interest and were self-dealing as they were also Directors of the Majority Shareholder, received Directors' fees from both the Majority Shareholder and the Bank, and most of the Directors were also shareholders of the Majority Shareholder. Their action enhanced their economic well being at the expense of the Plaintiff and the other minority shareholders.

Plaintiff claimed that Defendants breached their fiduciary duties owed to him and the other minority shareholders and seeks to have the action rescinded and for other relief.

Plaintiff requests 30 minutes of oral argument.

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JURISDICTIONAL STATEMENT

Plaintiff appeals from the Order Granting Defendants' Motion for Summary Judgment dated October 25, 2005 and the decision by the Court dated October 26, 2005, of the United States District Court for the Southern District of Iowa, Judge Ronald E. Longstaff presiding. The District Court's jurisdiction was based upon 28 U.S.C. §1332. This Court has jurisdiction pursuant to Rule 3A(1), Fed.R.App.P. pursuant to the Plaintiff filing a Notice of Appeal with the District Court within the time allowed by Rule 4, Fed.R.App.P., on the 23rd day of November, 2005.

This appeal is from a final order or judgment that disposes of all parties' claims.

APPLICABLE STANDARD OF REVIEW

The Court of Appeals reviews grant of summary judgment de novo. Federal Rules of Civ. Proc., Rule 56(c), 28 U.S.C., *Glass v. Medtronic, Inc.*, 957 F.2d 605 (8th Cir. 1992).

STATEMENT OF ISSUES

The District Court erred in granting Defendants' Motion for Summary Judgment for each of the following reasons:

1. The Bank's actions to eliminate the minority shareholders, including the Plaintiff, lacked a legitimate business purpose.

2. Iowa statutory law did not provide the minority shareholders, including the Plaintiff, proper appraisal rights.

3. The Plaintiff had standing to challenge the constitutionality of Iowa Code, §524.1406.

4. The Bank Directors' breach of fiduciary duties were not protected by "safe harbor" provisions of Iowa Code §490.832(1)(c).

5. The Bank Directors' defense of reliance on advice of counsel was not established by hearsay testimony or by other undisputed facts.

STATEMENT OF THE CASE

Plaintiff filed a Complaint on November 8, 2004 in the United States District Court Southern District of Florida. A. App. I. 1. Pursuant to the joint Motion to Transfer Venue to the United States District Court for the Southern District of Iowa, the matter was transferred to the United States District Court for the Southern District of Iowa, Central Division. A. App. I. 2. Defendants filed Answer and Defenses to the Complaint. A. App. I. 7.

Plaintiff was granted leave to file an Amended Complaint and filed an Amended Complaint for Recision, Damages and other Relief. A. App. I. 19. Plaintiff alleged that the Majority Shareholder and the Bank Directors had a conflict of interest and as self-dealers, breached their fiduciary duties to the Plaintiff by instituting and implementing a plan to remove the Plaintiff as a minority shareholder of the Bank. Plaintiff sought the relief of recision, damages and other relief.

Defendants filed an Answer to Plaintiff's Amended Complaint and also Affirmative Defenses. A. App. I. 26. The Affirmative Defenses relied upon by the Defendants were that Iowa's appraisal remedy is exclusive and bars Plaintiff's lawsuit, and that the Bank Directors' conduct is subject to the business judgment rule and in exercising their judgment they relied upon advice of counsel and others.

Defendants then filed a Motion for Summary Judgment which was granted by order dated October 25, 2005 (A. App. II. 456 and A. Ad. 1), and the decision by the Court dated October 26, 2005 (A. App. II. 474), of the United States District Court for the Southern District of Iowa, Judge Ronald E. Longstaff presiding.

STATEMENT OF FACTS

The Bank has been in existence since 1934. A. Ad. 2 In 1999, the Majority Shareholder was formed to acquire the Bank shares. A. Ad. 2. The Majority Shareholder shares were exchanged for 91.84% of the Bank shares and 8.16% of the Bank shares continued to be owned by 18 minority shareholders, including the Plaintiff. A. Ad. 2.

The Bank has been under the direction of the Eastburn Family since 1937, when the grandfather of Defendant, Eastburn, took control of the Bank. A. App. II. 264. The Eastburn Family is the largest shareholder of the Majority Shareholder. A. App. II. 264. The Eastburn Family Shareholders include Defendant, Eastburn, his two sisters, his father, and his three children. A. App. II. 324, 325, 326. Defendant, Eastburn, says he is running the entire organization. A. App. II. 341.

The Bank Directors are also all the Directors of the Majority Shareholder. The Directors are paid Directors' fees from both the Bank and the Majority Shareholder. The majority of the Directors, i.e., Eastburn, Nelson Anderson, Joe Carr, Sarah Cochran, Tom Thompson, Jay Silverman and Jon Simplot, the Bank's President, own shares of the Majority Shareholder. A. App. II. 265. The Majority Shareholder receives income, other than any of its investment income, from the profits of the Bank paid to it in the form of dividends. A. App. II. 280, 281.

On or about June 30, 2004, the Bank had excess liquidity which it had invested in CDs with other financial institutions with a yield of 3.60%. A. App. II. 266. The amount of excess liquidity was more than sufficient to purchase the shares of the 18 minority shareholders for a book value of $484.00 per share. A. App. II. 266. Using book value as a guide, the dividend yield on the Bank share was higher than 3.60%. A. App. II. 266. For instance, in the year 2002, Plaintiff received dividends of $3,251.84 a yield of 10.50% and in 2003 received dividends of $3,011.20 a yield of 9.72%. A. App. II. 266.

Plaintiff owns 64 shares of the minority shares. A. App. II. 431. James E. Weber is the trustee and the sole beneficiary of the Plaintiff which is a revocable living trust wherein Weber has the power to amend or revoke the trust in whole or in part. A. App. II. 430, 431. The 64 shares were inherited from his father, a long time resident and businessman in Fairfield, Iowa who acquired the shares more than five decades ago. A. App. II. 431. Weber was raised in Fairfield, Iowa where he attended grade school and high school. A. App. II. 431. Because of the inheritance from his father and his background in the Fairfield, Iowa community, Weber has sentimental value to the investment form of said shares. At no time has Weber sought to sell said shares. A. App. II. 431.

Prior to the Bank taking any action, Defendant, Eastburn, engaged the services of an appraiser to determine the value of the Bank's stock. A. App. II. 421. Defendant, Eastburn, and then the other Bank Directors knew that the appraiser valued the stock at book value prior to the time that any bank corporate action was taken to authorize a reverse stock split. A. App. II. 422. The appraisal of the bank stock obtained by the Bank for the reverse stock split considered minority and marketability discounts as required by Iowa Code §524.1406(3)(a). A. App. I. 75, 76.

With the knowledge of how the stock was valued by the appraiser, Bank Directors had a meeting on September 20, 2004 and passed a resolution approving an amendment to have a reverse stock split so that minority shareholders shares would be reduced to fractional shares and then there would be a cash buyout of the shares. A. App. II. 422.

Plaintiff was notified by a notice dated October 18, 2004 that there was to be a shareholder's meeting on October 28, 2004 to approve the reverse stock split and advised him of his appraisal rights. A. App. I. 50. Plaintiff did not receive this notice until October 21, 2004. A. App. II. 428. He was advised that if he wished to assert appraisal rights he must notify the Bank of his intent to demand payment for his shares before the shareholder vote is taken. A. App. I. 57. He must then deposit his

stock certificate with the Bank as prescribed by law and if he didn't do so, then he would lose his appraisal rights. A. App. I. 57.

Plaintiff did not attempt to assert any of the appraisal rights with this notification but did notify the Bank that he was voting against the reverse stock split at the shareholders' meeting being held on October 28, 2004. A. App. II. 428.

An amendment approving the reverse stock split was passed by a vote of more than 93% of the shareholders in favor of the amendment. A. App. I. 5. Since the Majority Shareholder owned almost 92% of the shares, only a small minority of the minority shareholders (approximately 1% of the approximate 8%) voted in favor of the amendment.

On November 8, 2004, Plaintiff commenced an action in the United States District Court Southern District Court of Florida. A. App. I. 1.

SUMMARY OF ARGUMENT

Argument

I. The Bank's actions to eliminate the minority shareholders, including the Plaintiff, lacked a legitimate business purpose.

The District Court held that the Bank's desire to reduce the number of shareholders to one is a legitimate business purpose. A. Ad. 14. If having a unified shareholder constitutes a legitimate business purpose, then any minority shareholder in any corporation is at the mercy of the majority shareholder(s). Further, where the Majority Shareholder and the Directors of the Bank have a conflict of interest and are engaged in self-dealing, as in this case, fiduciary duties are ignored and unconscionable results can occur. We do not have a merger in this case. It is merely a squeeze out so that the Majority Shareholder and the individual Defendants profit at the expense of the Plaintiff and the other minority shareholders.

Two courts have considered whether the National Bank Act authorized the OCC to approve a transaction in which national banks sought to cash out minority shareholders. Recognizing the long standing equity tradition of protection of minority shareholders in American Jurisprudence, the Court of Appeals for the Eleventh Circuit found that the OCC lacked the authority to approve bank mergers that required minority shareholders to accept cash for their shares while Majority

Shareholders were eligible to receive stock in the resulting bank, even in cases where minority shareholders had appraisal rights. *Lewis v. Clark*, 911 F.2d 1558 (11th Cir. 1990), *reh'g denied*, 972 F.2d 1351 (1991). Later, the Court of Appeals for the Eighth Circuit disagreed with Lewis and found that a national bank could cash out minority shareholders, consistent with the National Bank Act, as long as there is a valid business purpose for the transaction and the minority shareholders are entitled to dissenter's rights. *NoDak Bancorporation v. Clarke*, 998 C.2d 1416 (8th Cir. 1993).

In the District Court opinion the Court stated: (A. Ad. 12, 13)

> "...NoDak... addressed the question of when a bank may force minority shareholders to accept cash in exchange for shares, and concluded that so long as it is done for a proper business purpose and minority shareholders are offered dissenter's rights, such corporate tactics are permissible. Although NoDak addresses the legality of what are commonly described as [freeze out] mergers under the National Bank Act, its analysis is applicable to reverse stock splits under state law as well."

Even though there is a conflict between this Circuit Court of Appeals and the Eleventh Circuit Court of Appeals, Plaintiff submits that if *NoDak* is to be applied to the facts of this case, Plaintiff must prevail.

The District Court held that the requirements of *NoDak* are met. A. Ad. 14. First, the District Court held the Bank's desire to reduce the number of shareholders to one, the Majority Shareholder, is a legitimate business purpose. A. Ad. 14. Second,

because Iowa law provides for appraisal rights in stock split situations, and Plaintiff was provided these rights, the second requirement of *NoDak* is also met. A. Ad. 14.

As to the appraisal question, this matter will be discussed in Issue II hereinafter.

The Bank was obviously doing quite well. It had sufficient funds on hand to cash out the minority shareholders for book value of the minority shares. This increased cash flow upstream to the Majority Shareholder from which all of the Bank Directors were receiving fees and most of them were shareholders entitling them to dividends as well as appreciation of their stock. The Bank Directors claimed that their actions were for efficiency and administrative savings. A trier of fact could very well find there was no valid purpose and the entire transaction was a mere subterfuge designed to eliminate the minority shareholders.

It is submitted that credibility of Defendant, Eastburn, and other Bank Directors should not be determined in a Motion for Summary Judgment. A Court that is ruling on summary judgment may not make credibility determinations. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2502, 91 L.Ed.2d 202 (1986). In the Advisory Notes, 1963 Amendment, under Rule 56, Federal Rules of Civil Procedure, the following:

> "Nor is the amendment designed to affect the ordinary standards applicable to the summary judgment motion. So, for example: where an issue as to a material fact cannot be

> resolved without observation of the demeanor of a witness in order to evaluate the credibility, summary judgment is not appropriate. Where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented."

Additionally, the claimed purposes of efficiency and administrative savings are di minimus.

In *Kelley v. Wellsville Foundary, Inc.*, 2000 WL 1809021 (Ohio App. 7 Dist.) A dispute arose between the only two shareholders. The majority shareholder was employing a reverse stock split in order to remove the minority shareholder's interest. Rather than proceeding to arbitration as to the value of the minority stock interest, the minority shareholders initiated a lawsuit to halt the reverse stock split. The court held that imposition of the business purpose rule is necessary to protect the interest of a minority shareholder and in citing favorably from the majority shareholder's brief the Court stated, at page 5, that the rule sought by the majority shareholder would permit:

> "A majority shareholder of a close corporation at any time to eliminate the minority shareholders so that the majority may reap solely for themselves any benefit from investment in the corporation. As such, the minority shareholder in Ohio would be relegated to the position that although he as patiently waited for years with his investment at risk, once the economic enrichment have come in, he will be waiting at the empty dock while the majority shareholder sails on to the economic prosperity with impunity as to the rights of the minority shareholder."

A test to be applied when minority shareholders in close corporation bring suit against majority alleging breach of strict faith duty owed to them by majority is where the controlling group can demonstrate a legitimate business purpose for its action. See *Leader vs. Hycor, Inc.,* 395 Mass. 215,479 N.E.2d 173 (Mass.1985).

Defendants failed to meet this test so as to be entitled to a summary judgment.

II. Iowa statutory law did not provide the minority shareholders, including the Plaintiff, proper appraisal rights.

The District Court held that because Plaintiff was afforded appraisal rights, the second requirement of *NoDak*, *supra*, is also met. A. Ad. 14.

In *Bloomington National Bank vs. Telfer*, 916 F.2d 1305 (Ind. 7th Cir. 1990), appraisal rights were not available to minority shareholders under Indiana law, and the plan to eliminate minority shareholders was held unsuccessful. The Court stated on pages 1308 and 1309 the following:

> "Bloomington has attempted to do nothing more than squeeze out the minority shareholders by repurchasing its stock and reducing it to fractional shares through a reverse stock split, thereby necessitating the bank's purchase of the fractional shares. The District Court correctly concluded that the bank's plan was, at best, a clever little scheme having only the color of legality and cannot be upheld".

The *NoDak* opinion can be distinguished from *Bloomington* as the *NoDak* facts included appraisal rights under the federal law. In discussing appraisal rights in *NoDak*, the Court qualified what appraisal rights should be available to minority shareholders when it used "ample appraisal rights," (page 1423) "appropriate appraisal remedy," (page 1424) "full appraisal rights," (page 1424) and "fair appraisal." (Page 1425).

At page 1425 the Court stated:

> "The National Bank Act does demand that the amount of cash the minority receives is a fair appraisal of the value of its interest and it sets out appraisal rules to insure this."

The Federal law held by the *NoDak* Court to allow appropriate appraisal rights is 12 U.S.C. §215a(c). This law sets forth a process where a committee of three is chosen. An appraiser is chosen by each of the opposing parties and a third appraiser is chosen by the two. If either party is dissatisfied with the committee's valuation, he can appeal to the comptroller who will then obtain another valuation. There is no requirement for the appraisers to consider discounts for minority interests and discounts for lack of marketability.

This Court has considered the meaning of fair value to be paid to a minority shareholder. The Eighth Circuit in *Swope v. Siegel-Robert, Inc.,* 243 F.3d 486 (8th Cir. 2000) involved a minority shareholder giving written demand on the company for the "fair value" of their stock rather than to take the offered amount for the stock. The Missouri statute stated that the shareholder was to be paid fair value and did not elaborate or further define fair value.

The Eighth Circuit Court held that proper evaluation of minority stock must calculate the value of corporation as a whole and award pro-rata share of that value to dissenting shareholders; this valuation reflects shareholder's actual interest in company prior to corporate change, independent of market variables or influences,

and dictates that fair value of dissenter's minority share should remain equal to value of majority shares. It held that a discount for lack of marketability was inappropriate in an appraisal proceeding because majority shareholders are not willing sellers, and appraisals for estate tax purposes are not relevant to determining fair market value pursuant to dissenter's appraisal proceeding.

The American Law Institute explicitly confirms the interpretation of fair value as the proportionate share of the value of 100% of the equity by entitling a dissenting shareholder to a proportionate interest in the corporation, without any discount for minority status or, absence extraordinary circumstances, lack of marketability. American Law Institute standards for determining fair value, principals of corporate governments, analysis and recommendations (ALI)§722(a)1994.

The appraisal rights for Bank shareholders as set forth under Iowa Law do not afford appraisal rights as provided in the National Bank Act which was determined by the *NoDak* Court to be ample, appropriate, full and fair. Iowa statutory law requires consideration be given to discounts for minority interests and discounts for lack of marketability.

The District Court also cited Iowa Code §490.1302(4)(A. Ad.10), which states among other things, the following:

> "A shareholder entitled to appraisal rights under this Chapter is not entitled to challenge a completed corporation action for which appraisal rights are available..."

Appraisal rights without being ample, appropriate, full, or fair, are a nullity. This statute should not be held to trump the self-dealing by the Majority Shareholder and the Bank Directors.

Plaintiff's Amended Complaint alleges that the Defendants cherry picked favorable Iowa statutes for the purpose of eliminating the minority shareholders for their benefit which violated fiduciary responsibilities to Plaintiff.

Coggins v. New England Patriots Football Club, Inc., 397 Mass 535, 492 N.E.2d 1112 (Mass.1986) provides a multitude of principles which are applicable including the principle that a judge should examine with close scrutiny the motive and behavior of controlling shareholders and dissenting shareholders are not limited to statutory remedy of judicial appraisal where violation of fiduciary duties are found.

In *Rabkin vs. Hunt*, 498 A.2d 1099 (Del. 1985), at page 1104, the Court stated:

> "Where a Plaintiff's monetary remedy ordinarily should be confined to the more liberalized appraisal proceeding herein established, we do not intend any limitation on the historic powers of the chancellor to grant such other relief as the facts of a particular case may dictate. The appraisal remedy we approve may not be adequate in certain cases, particularly where fraud, misrepresentation, self-dealing, deliberate waste of corporate assets, are gross and palpable over-reaching or involved."

and at page 1107 the following:

"...inequitable conduct will not be protected merely because it is legal."

Defendants' inequitable conduct should not be protected by them using cherry picked Iowa statutes.

III. The Plaintiff had standing to challenge the constitutionality of Iowa Code §524.1406(3)(a).

As an affirmative defense to the Plaintiff's Amended Complaint, Defendants pled the following:

> "Iowa's appraisal remedy is exclusive and bars Plaintiff's lawsuit." A. App. I. 28.

It is submitted that if said statute is an exclusive remedy, the Plaintiff necessarily has to have standing to challenge its constitutionality to avoid the affirmative defense. This issue will be rendered moot if this Court agrees with Plaintiff on one or more of the other issues raised in this brief. The District Court held that the Plaintiff did not have standing to challenge the constitutionality of the statute since it never was applied to him and he suffered no injury. A. App. I. 15, 16. The facts are contrary. Plaintiff was notified he must either accept the book value of his shares or assert his appraisal rights under a statute that required consideration to be given to discounts for minority and discounts for marketability. To have to choose between book value and an unconstitutional statute is an application of the statute to the Plaintiff.

In accordance with the District Court's opinion, in order for the Plaintiff to have standing to challenge the constitutionality of the statute, it appears the Plaintiff would have to do the following: (1) Notify the Bank of his demand for an appraisal of his shares before the shareholder vote was taken on October 28, 2004; (2) Deposit his

stock certificates as required; and (3) Institute a Court action to declare the statute unconstitutional.

Rather than to have this onerous and convoluted process imposed upon a minority shareholder in Iowa, there was a very simple procedure which could have been followed by the Bank pursuant to Iowa Code §524.1406(3)(b):

> "Prior to giving notice of a meeting, at which a shareholder of a Bank recognized under this Chapter or a Bank holding company is defined in §524.1801 would be entitled to appraisal rights, such Bank or Bank holding company may seek a declaratory judgment to establish the fair value for purposes of §490.1301(4), of shares held by such shareholders."

Earlier another Iowa bank followed this procedure, *State Central Bank vs. Agger*, Case No. LALA005030 (Iowa D.Ct. August 7, 2000). A. App. I. 162.

It would have been a far less onerous task for the Bank to proceed under this statutory procedure then to require the Plaintiff and the other minority shareholders to proceed as stated hereinabove. This is particularly true in the case where the Majority Shareholder and the Bank Directors are in a conflict of interest and are engaged in self-dealing.

The time line encountered by Plaintiff was: (1) Plaintiff receives the notice of the shareholder's meeting scheduled for October 28, 2004 on October 21, 2004;

(2) Plaintiff has to understand all of the Iowa statutes sent to him and is advised to consult with an attorney in order to decide whether to seek his appraisal rights within less than one week; (3) If he does determine that he does want to seek appraisal rights, he must so notify the Bank prior to October 28, 2004; (4) He must vote against the amendment; and (5) He must deposit his stock or execute forms in the manner provided by law. Thereafter, Plaintiff must bring a lawsuit to challenge the constitutionality of the statute.

While Defendants maintain they followed the statutory law, they could have followed other statutory law, i.e. Iowa Code §524.1406(3)(b) which would have been fair to the Plaintiff and the other minority shareholders. They would not have placed the Plaintiff in the above position under said time line. No legal procedure in a trial court or appellant court is compressed within this small period of time. The choice of Defendants not to utilize Iowa Code §524.1406(3)(b), is evidence of the Defendant's desire to rush this plan through in order to eliminate the minority shareholders for their benefit. It truly is a cleaver little scheme having only the color of legality and should not be upheld.

In case the constitutionality of the statute is not rendered moot, then this matter should be sent back to the District Court for determination of whether the appraisal statute is constitutional unless this Court concludes that the statute is unconstitutional.

As to the constitutionality issue, Plaintiff filed a brief in support of its Motion to Allow Further Pleading setting forth Plaintiff's arguments that the statute is unconstitutional. A. App. I. 9. Additionally, Plaintiff calls to the Court's attention *State Central Bank v. Agger, supra*, a well reasoned opinion of why this statute is unconstitutional. Recently, in *Racing Association of Central Iowa v. Fitzgerald*, 675 N.W.2d 1(Iowa 2004), the Iowa Supreme Court held that the differential tax between racetracks and river boats violated Article I, Section 6, of the Iowa Constitution. In reaching its conclusion, it employed the rational basis test which was also employed by the Iowa District Court in *Agger*, *supra*.

IV. The Bank Directors' breach of fiduciary duties were not protected by "safe harbor" provisions of Iowa Code §490.832(1)(c)

The District Court held that the Directors did not violate their duty of loyalty because the Bank Directors' conflict of interest is protected by the "safe harbor" provision of Iowa Code §490.832(1)(c). A. Add. I. 18.

Iowa Code §490.832(1) is not applicable to the facts in this case. It states as follows:

> "A conflict of interest transaction is a transaction with the corporation in which a Director of the corporation has a direct or indirect interest. A conflict of interest transaction is not voidable by the corporation..."

The District Court opinion only cited the first sentence in the statute and then skipped to the remaining paragraphs. A. Ad. 17, 18. It is not applicable because this case does not involve an attempt by a corporation to void a conflict of interest transaction. In this case a minority shareholder is bringing an action against the Majority Shareholder and the Bank Directors for breach of their fiduciary duties.

Even if this statute would be applicable, it cannot be concluded that the transaction was fair to the corporation as stated by the District Court. A. Ad. 18. The Bank was making money and paying out its dividends to its shareholders, including the Majority Shareholder and the minority shareholders.

It is not entirely clear what corporation the District Court was considering. The relevant corporation is the Bank and not the Majority Shareholder. The Court found that between the time when the Majority Shareholder was established in November, 2004, the Bank and the Majority Shareholder operated with two sets of shareholders and two Boards of Directors (albeit the same directors served on both boards). A. Ad. 2. While this is true, it remains true even after November, 2004 as there was no merger of the corporations. The only difference was that the Bank only had one shareholder but nevertheless it still has independent legal significance as a separate corporate entity and has a separate board of directors and separate shareholder records.

The District Court held that the Bank Directors made a good faith effort to insure that the minority shareholders were paid a fair price. A. Ad. 18. This is contrary to the record. It is clear that prior to any corporate action being taken by the Bank, the Bank Directors knew the results of the appraisal which considered minority discounts and marketability discounts. The arguments set forth under II herein above are also applicable to this issue.

This "safe harbor" does not insulate the individual Defendants from liability and should not be a basis for a summary judgment in their favor.

V. The Bank Directors' affirmative defense of reliance on advice of counsel was not established by hearsay testimony or by other undisputed facts.

Another affirmative defense of the Defendants to the Plaintiff's Amended Complaint is as follows:

> "Directors' conduct is subject to the business judgment rule. All Directors in exercising their business judgment properly relied on the advice of management, experts and counsel." A. App. I. 28.

The advice of counsel is relevant to their affirmative defense and to their position that they are insulated from any personal liability because of advice of counsel. Other than Bank Directors saying that they received advice of counsel, the record is devoid of any legal opinion by way of affidavit of an attorney, any writing or testimony from an attorney, or any other matter pertaining to advice of counsel. The District Court found that this was not hearsay and was admissible because testimony from a witness about factors upon which they relied upon for their own actions are admissible as non-hearsay. A. Ad. 9. Even if this is true, credibility issues remain as to the motivation and purposes of the Bank Directors set forth earlier under the argument under II above. Credibility issues should not be determined by a summary judgment. The burden should not fall upon the Plaintiff to contact any and all attorneys that may have been utilized by any of the Defendants and to ascertain what

advice, if any, was given, upon what facts the advice was based, and other relevant information.

Further, it would be reasonably expected that a competent lawyer specializing in this field would advise the individual Defendants that their offer of book value to the minority shareholders may be questionable by virtue of a decision of the Iowa Supreme Court that held that a bank's offer of book value to dissenting shareholders for their shares was arbitrary. See *Security State Bank, Hartley, Iowa v. Ziegeldorf*, 554 N.W.2d 884 (Iowa 1996). Further, it would be reasonably expected that such advice would be that Iowa Code §524.1406(3)(a) had not been tested by an appellate court decision in Iowa and that there was a trial court ruling in Iowa holding the statute to be unconstitutional. See *State Central Bank v. Agger*, *supra*, which involved a bank in Keokuk, Iowa, a neighboring community. Finally, it would be reasonably expected that such advice would include the availability of Iowa Code §524.1406(3)(b) which would protect them and the minority shareholders.

Legal advice is not as simple as having someone say that they did something because of legal advice. A legal opinion by its nature depends upon the facts given to the advisor, what the opinion was based upon, and the competency of the advisor. Advice of this nature is ordinarily reduced to some type of written form which was not produced by the Defendants.

Also, legal advice is a matter of expert opinion. Moore's Federal Practice Third Edition, Matthew Bender, §56-14(1)(e) at page 56-170 states the following:

> "Expert opinion evidence set forth in an affidavit must constitute admissible evidence. Opinions of an expert must be in a form competent to be considered, including an indication of the expert's competency, and must be relevant to the issues raised by the summary judgment motion."

The record of this case does not support the defense of advice of counsel in order to grant a summary judgment for Defendants.

CONCLUSION

The Order and Judgment that granted Defendants' Summary Judgment should be reversed and this case should be remanded to the District Court for a trial on the merits and such other relief as determined by this Court.

Dated this 12th day of January, 2006.

Respectfully submitted,

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1. This brief complies with the type-volume limitation of Fed.R.App.P. 32(a)(7)(B) because this brief contains 5,056 words, excluding the parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii), or

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Dated this 12th day of January, 2006.

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By_____
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1. The enclosed 3 1/2 inch computer diskette complies with Fed.R.App.P. 28A(d)(2).

2. The diskette has been scanned for viruses and it is virus-free.

Dated this 12th day of January, 2006.

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By_____
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CERTIFICATE OF FILING

I hereby certify that on January 12, 2006, I deposited in the Federal Express depository the original and nine copies of Appellant's Brief and Addendum for delivery to the United States Court of Appeals for the Eighth Circuit, Clerk's Office, Thomas F. Eagleton Courthouse, Room 24.329, 111 S. 10th Street, St. Louis, Missouri 63102.

I further certify that on January 12, 2006, I deposited in the Federal Express depository three copies of Appellant's Appendix - Volume I and Appellant's Appendix Volume II for delivery to the United States Court of Appeals for the Eighth Circuit, Clerk's Office, Thomas F. Eagleton Courthouse, Room 24.329, 111 S. 10th Street, St. Louis, Missouri 63102.

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CERTIFICATE OF SERVICE

I hereby certify that on January 12, 2006 I deposited in the United State Mail, two true and correct copies of Appellant's Brief and Addendum for delivery to MICHAEL R. RECK, ESQ., Belin Lamson McCormick Zumbach Flynn, a Professional Corporation, The Financial Center, 666 Walnut Street, Suite 2000, Des Moines, Iowa 50309-3989.

I further certify that on January 12, 2006 I deposited in the United State Mail, two true and correct copies of Appellant's Appendix Volume I and Appellant's Appendix Volume II for delivery to MICHAEL R. RECK, ESQ., Belin Lamson McCormick Zumbach Flynn, a Professional Corporation, The Financial Center, 666 Walnut Street, Suite 2000, Des Moines, Iowa 50309-3989.

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